Supreme Court, U. S.
FILED
JUN 12 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1763

CHARLES SUTTON, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

CECIL HUMPHRIES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

EUGENE H. PHILLIPS
2219 Wachovia Building
Winston-Salem, North Carolina 27101

RICHARD N. WEINTRAUB
Post Office Box 1188
Durham, North Carolina 27702

Counsel for Petitioners

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

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The petitioners, Charles Sutton, Jr. and Cecil Humphries, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in case number 77-1389, United States of America, Appellee v. Charles Sutton, Jr., Appellant, and case number

77-1390, United States of America, Appellee v. Cecil Humphries, Appellant (the cases having been tried, appealed, and decided together), which judgment affirmed an earlier judgment of the United States District Court for the Middle District of North Carolina.

OPINION BELOW

There was no opinion in the District Court. The opinion of the Court of Appeals will not be published in the official reports, and a copy thereof is appended hereto.

JURISDICTION

Jurisdiction to review the above judgment of the United States Court of Appeals, rendered May 11, 1978, is conferred by 28 U.S.C. §1254(1).

QUESTION PRESENTED

After the petitioners had declined to plead guilty to the first piece-meal indictment, which charged each with fewer offenses, unrelated to each other, and after they had obtained an order requiring one petitioner to be tried by himself on his two charges, and requiring the several charges against the other petitioner to be resolved in four different trials, and with no new evidence at all being obtained during the interim, and with no other justification being recorded therefor – did the district court and the court of appeals err in holding that due process was not violated by trying the petitioners and their co-defendant together on all twelve counts of a re-worked, new indictment based on the same identical occurrences as the first indictment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1254

Courts of Appeal, Certiorari, Appeal, certified question

Cases in the Courts of Appeal may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari, granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree..

U. S. Constitution

Amendment V – Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The production and marketing of tobacco is controlled and regulated by federal law. Among other things, farms authorized to grow tobacco are identified by Department

of Agriculture quota cards, and when tobacco is marketed, the regulations require that it be accompanied by the quota card of the farm that it was grown on. Wilfully marketing tobacco by using a quota card issued to a farm other than the one that the tobacco was grown on has been deemed to violate § 1001, and conspiring so to do has been deemed to violate § 371, Title 18, United States Code. Neither holding is contested by this petition, which concerns only the violation of due process rights, by trying the petitioners together on a re-worked, harsher, more extensive second indictment because they had refused to plead guilty to a weaker, severable, and more easily defended first indictment.

The petitioner Humphries owned and operated the Big Yadkin Tobacco Warehouse in Yadkinville, North Carolina during the fall of 1973, and the petitioner Sutton was employed there, as was the late Herbert T. Highsmith. All three – and six others – were indicted September 7, 1976, because of various quantities of tobacco that were sold at the Big Yadkin during October and November, 1973. It was a 20-count indictment, obtained after nearly three years' investigation, that charged various of the nine defendants, in different combinations, with misusing department quota cards in marketing tobacco on eleven different occasions, and of conspiring in regard thereto on nine of those occasions. The indictment was a hodgepodge of unrelated charges; no two of the nine defendants were charged with the same offenses, and there was no joint charge at all against these petitioners, either by themselves or with others. Highsmith (who was tried with the petitioners and died while the appeal was underway) was charged with only one marketing offense and of conspiring with Sutton and others in regard thereto. The petitioner Humphries was charged only with two marketing card offenses, one acting alone, and the other in collaboration with an un-indicted accomplice. The petitioner Sutton was charged with nine distinct marketing transactions and with nine separate conspiracies in regard thereto, none of which involved Humphries, and only one of which involved Highsmith. The other six defendants, in different combinations with themselves and others, were charged with from one to six marketing offenses and conspiracies each. These latter – five tobacco farmers and the bookkeeper and office manager of the Big Yadkin (Langley) – all lived in the same part of South Carolina, and two and a half years earlier, when the investigation was begun, each farmer had admitted selling, and the bookkeeper-office manager had admitted buying, the use of the tobacco quota cards involved. Immediately after the indictment, all six indicated that they would plead guilty – and all eventually did so.

But, when arraigned October 8, 1976, the petitioners and Highsmith stood on their rights, and November 1, 1976, they obtained an order requiring that they and the various charges against them be tried on five different occasions, as follows:

That the petitioner Humphries be tried by himself on his two counts;

That Highsmith and Sutton be tried together on the only two counts that involved both of them;

That the several other charges against Sutton be resolved in three different trials..

At the same time the above order was entered, the petitioners' motions to delay the trial were denied, and the

trials were scheduled for the December, 1976 term, though the beginning date was not fixed at that time, because the Assistant United States Attorney handling the cases was then engaged in a trial of uncertain duration. But none of the five trials on the first indictment were held. December 6, 1976, without notice to the petitioners or the judge, while the petitioners were standing by, ready for trial, without any new evidence being obtained, and with no other justification therefor being recorded a second indictment, based on identically the same events, was returned against them and Highsmith. This indictment charged each of them with committing all eleven marketing offenses – (whereas, the first indictment charged Humphries with being involved in but two of them, and Highsmith with but one) – and of participating in one master conspiracy in regard thereto. When tried, several weeks later, though the petitioners and Highsmith denied committing any of the offenses, and though none of the farmers that sold the use of their quota cards had ever seen or heard tell of the petitioners and Highsmith, and though there was testimony about Highsmith participating in only one of the eleven transactions, and about Humphries participating in another, with the evidence that tended to involve each of the tri-defendants being received against all, all were convicted. And upon appeal, the judgment of the district court was affirmed by a per curiam opinion that analyzed neither the record nor the legal principles that apply to it.

BASIS OF FEDERAL JURISDICTION

Federal jurisdiction in the court of first instance is based upon the fact that the defendants were charged with violating the provisions of §1001 and §371 of Title 18, United States Code.

REASONS FOR GRANTING THE WRIT

In the opinion below, the court of appeals misapplied this Court's ruling in *Bordenkircher v. Hayes,* ___ U.S. ___ (January 18, 1978), thereby beclouding "a constitutional question of importance in the administration of justice," because of which, this writ should be granted.. The differences between that case and this are both distinct and decisive. In *Bordenkircher,* the record showed that during plea bargaining on the indictment initially issued, the defendant was warned that if he did not plead guilty, that an additional indictment would be issued, charging him with being an habitual felon, which his record clearly warranted. And after he was so indicted and convicted, this Court said:

> "This is not a situation, therefore, where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant's insistence on pleading not guilty."

But in this case: no charge was left out of the first indictment, which covered the same identical transactions and occurrences as the second indictment; and no additional charges were either threatened, mentioned, or considered during plea bargaining on the first indictment. And the petitioners and their counsel, who were engaged and were preparing for an altogether different trial, were surprised when the indictment was suddenly re-issued, so as to enable the petitioners and their co-defendant to be tried together on the re-worked charges.

Since *Blackledge v. Perry,* 417 U.S. 21 (1974), and its progenitor, *North Carolina v. Pearce,* 395 U.S. 711 (1969),

the commendable policy of protecting defendants from even the appearance of retaliatory prosecution has been applied in several cases whose facts were weaker than those in this case, including the following:

> *United States v. Jamison*, 505 F.2d 407 (D.C. Cir. 1974), where defendant was re-indicted for first degree murder, after successfully moving for a mistrial in a prosecution for second degree murder.
>
> *United States v. Ruesqa-Martinez*, 534 F.2d 1367 (9th Cir. 1976), where defendant, first arraigned on a single count misdemeanor, was re-indicted on a multiple count felony after refusing to waive jury trial.
>
> *United States v. DeMarco*, 401 F. Supp 505 (C.D. Cal. 1975), where Nixon aide was indicted for an additional substantive offense, after successfully obtaining a change of venue and refusing to stand trial jointly with co-defendant under prior conspiracy and 18 U.S.C. § 1001 counts.
>
> *United States v. Gerard*, 491 F.2d 1300 (9th Cir. 1974), where defendant, after withdrawing his guilty plea, was indicted on new firearms count that was associated with the offense initially charged.

Blackledge, of course, placed no *aboslute* bar to the bringing of more or heavier charges after a defendant has invoked rights under a prior indictment. But where it is obvious that things might have been made tougher for a defendant just because he stood on his rights, it did *put the burden on the prosecution to show that that was not the case.* As the court there indicated, and as *Bordenkircher* shows, this burden be met by showing "intervening events" and other

justifying circumstances. But no such "intervening events" or other justifying circumstances occurred or existed here. The government here had petitioners under investigation for three years before bringing the first indictment. The dates, places, pounds, card numbers, card owners, and other details of the eleven marketing transactions alleged in the second indictment were identical to those in the first, and no new evidence was obtained relating the petitioners to any of them or to the conspiracy alleged with respect thereto. According to the government's files, examined during discovery, all the evidence presented at the trial was unearthed long before the first indictment was brought, and no new evidence at all was unearthed thereafter. How the court of appeals formed the impression that "the record shows that the evidence to justify a prosecution of new charges in the second indictment was not uncovered until after the first indictment was returned," is not known. There is nothing at all in the record to warrant that declaration.

Also in ruling that prosecutorial vindictiveness was disproved by the prosecutor's willingness to continue until the last to accept a plea to a single count of the original indictment, the court of appeals misperceived the usual thrust and purpose of prosecutorial vindictiveness, and the thrust and purpose in this instance. Prosecutors are judged by their conviction rate, not by the sentences imposed, and nearly all prosecutorial overreaching comes about from trying to assure a conviction or a guilty plea in the first place, the punishment received being of little or no concern to most prosecutors. And re-working an indictment simply "to create a stronger case for the government," after a defendant has stood on his rights, is simply the other side of the prosecutorial vindictiveness coin. *United States v. Johnson*, 537 F.2d 1170 (4th Cir. 1976).

CONCLUSION

The decision below conflicts with decisions of this Court. And the writ should be granted – both to prevent these petitioners from being deprived of their due process rights, and also to enable the Court to clarify the restrictions under which an indictment can be re-worked to a defendant's detriment, after he has stood on his rights.

Respectfully submitted,

EUGENE H. PHILLIPS
2219 Wachovia Building
Winston-Salem, North Carolina 27101

RICHARD N. WEINTRAUB
Post Office Box 1188
Durham, North Carolina 27702

Counsel for Petitioners

APPENDIX

OPINION BELOW

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1389

United States of America,

Appellee,

v.

Charles Sutton, Jr.,

Appellant.

No. 77-1390

United States of America,

Appellee,

v.

Cecil Humphries,

Appellant.

Appeals from the United States District Court for the Middle District of North Carolina, at Winston Salem. Eugene A. Gordon, Chief Judge.

Argued April 7, 1978 Decided May 11, 1978

Before WINTER, RUSSELL and HALL, Circuit Judges.

Eugene H. Phillips (Richard N. Weintraub on brief) for Appellants; Benjamin H. White, Jr., Assistant United States Attorney (H. M. Michaux, Jr., United States Attorney, on brief) for Appellee.

PER CURIAM:

We see no error in the multiple convictions of Charles Sutton, Jr., and Cecil Humphries for willfully marketing tobacco improperly using quota cards, in violation of 18 U.S.C. §1001, and the single conviction for conspiracy in regard thereto, in violation of 18 U.S.C. § 371.

On appeal, their principal contention is that they were denied due process of law and were the victims of prosecutorial misconduct when they were tried and convicted on a superseding indictment charging multiple violations of § 1001 after they declined to plead guilty to one count of the original indictment charging fewer violations of § 1001. The contention is lacking in merit for two reasons. First, the record shows that the evidence to justify a prosecution of the new charges in the second indictment was not uncovered until after the first indictment was returned. There was thus reason for the second indictment aside from prosecutorial vindictiveness. Second, the government's offer to accept a plea to a single count of the original indictment was renewed and kept open to the date of trial on the superseding indictment. The case is thus governed by Bordenkircher v. Hayes, ___ U.S. ___ (January 18, 1978).

We see no merit in defendants' argument in regard to the district court's refusal to give their requested partnership instruction.

AFFIRMED.